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SEC

SERVICE DATE - FEBRUARY 25, 2000

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32549

BURLINGTON NORTHERN INC., AND BURLINGTON NORTHERN RAILROAD
COMPANY — CONTROL AND MERGER — SANTA FE PACIFIC CORPORATION
AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
[Decision No. 50]¹

STB Finance Docket No. 32549 (Sub-No. 22)

BURLINGTON NORTHERN INC., AND BURLINGTON NORTHERN RAILROAD
COMPANY — CONTROL AND MERGER — SANTA FE PACIFIC CORPORATION
AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
[PETITION TO REOPEN — ROQUETTE AMERICA, INC.]

Decided: February 24, 2000

¹ The prior decision served on February 11, 2000, granting Roquette America, Inc.'s motion for waiver of the 20-page limitation for filing petitions to reopen under 49 CFR 1115.4 and 1115.3(d), shall be designated as Decision No. 49 in the lead proceeding.

On February 22, 2000, Roquette America, Inc. filed a motion for waiver (RAI-10) of the requirement to serve all parties of record in Finance Docket No. 32549. Specifically, petitioner requests to limit the service list in this proceeding to the parties, listed in Appendix B, that have or might have an interest in the proceeding. Petitioner's request for a limited service list is granted and, for administrative convenience, this proceeding will be docketed as STB Finance Docket No. 32549 (Sub-No. 22).

This decision will be served on all parties on the service list in the lead proceeding, Finance Docket No. 32549, to serve as notice that persons who were parties of record in Finance Docket No. 32549 will not automatically be placed on the service list as parties of record in the STB Finance Docket No. 32549 (Sub-No. 22) proceeding. Any persons who do not appear on the list in Appendix B, but who are interested in being on the STB Finance Docket No. 32549 (Sub-No. 22) service list, must send written notification both to the Board and to Roquette America, Inc.'s representative at the following addresses: (1) Office of the Secretary, Case Control Unit, Attn: STB Finance Docket No. 32549 (Sub-No. 22), 1925 K Street, N.W., Washington, DC 20423-0001; and (2) Robert P. vomEigen, HOPKINS & SUTTER, 888 Sixteenth Street, N.W., Washington, D.C. 20006.

On February 15, 2000, Roquette America, Inc. (RAI or petitioner) filed a petition to reopen the decision in Burlington Northern Et Al. — Merger — Santa Fe Pacific Et Al., 10 I.C.C.2d 661 (1995) (BNSF Merger),² to remedy an alleged loss of railroad competition at RAI's facilities at Keokuk, IA. In its petition to reopen, RAI contends that a condition imposed by the ICC in BNSF Merger failed adequately to preserve rail competition at Keokuk and that, accordingly, another Class I railroad should be given access to that location.

In a petition also filed on February 15, 2000 (RAI-4), petitioner asks the Board to enter a protective order. According to RAI, a protective order is necessary to ensure the confidentiality of the highly confidential version of its petition to reopen (RAI-3), which contains proprietary traffic data, cost, rate, revenue and other commercial information. RAI also states that a protective order is necessary to ensure the confidentiality of information it expects to obtain through discovery, as well as information that other parties might obtain in this proceeding.

RAI requests that the highly confidential version of its petition to reopen be kept under seal and not placed in the public docket or otherwise disclosed to the public or persons other than those executing a highly confidential undertaking. RAI maintains that disclosure of the highly confidential version of its petition would be competitively damaging, would abrogate RAI's contractual obligations to keep certain information confidential, and is not required for disposition of the petition to reopen. RAI proposes that the protective order apply to all designated information exchanged in this proceeding.

The request is similar to those for protective orders in other rail merger cases.³ Unrestricted disclosure of confidential proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

² In BNSF Merger, our predecessor agency, the Interstate Commerce Commission (ICC), approved the acquisition of control of Santa Fe Pacific Corporation by Burlington Northern Inc., and the common control and merger of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company.

³ See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556, Decision No. 1 (STB served Feb. 26, 1998); CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 1 (STB served Apr. 16, 1997).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a protective order is granted and the parties to this proceeding must comply with the Protective Order in Appendix A.⁴
2. The motion for waiver (RAI-10) to limit the service list to the parties designated in Appendix B is granted, and this proceeding is docketed as STB Finance Docket No. 32549 (Sub-No. 22). Any persons who do not appear on the list in Appendix B, but who are interested in being on the STB Finance Docket No. 32549 (Sub-No. 22) service list, must send written notification to the Board with a copy to RAI's representative at the addresses noted in this decision.
3. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

⁴ This decision protects the information, materials, and data set forth in the attached Appendix whether contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX A

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, rates, revenues, and other confidential or proprietary business information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or HIGHLY CONFIDENTIAL” in accordance with paragraph 3 or 4 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (Board) concerning Roquette America, Inc.’s Verified Petition to Reopen Finance Docket No. 32549, and any related proceedings before the Board, and any judicial review proceedings arising from the Petition to Reopen Finance Docket No. 32549 or from any related proceedings before the Board.

2. Upon completion of the Proceedings, including any petitions for reconsideration, appeals or remands, all Confidential Documents, other than copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings, must be destroyed⁵ or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

3. If any party to these Proceedings determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper filed or served in these Proceedings contains Confidential Information or consists of Confidential documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

4. Any party producing material in discovery to another party to these Proceedings, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing rate, revenue or cost data or other

⁵ “Destroy” shall mean shredding of paper documents and destruction of computer-memory devices (e.g., floppy diskettes).

competitively sensitive or proprietary information, as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

5. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit 1 to this Order.

6. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit 2 to this Order.

7. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

8. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings or in any judicial review proceeding arising therefrom, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, or to the reviewing court as appropriate, and has accompanied such submission with a written request that the Board, administrative law judge or other officer, or court (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.
12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order.
13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 3 or 4 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICCTA.
14. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.
15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit 1

UNDERTAKING — CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on February 25, 2000, governing the production and use of Confidential Information and Confidential Documents in the proceeding on Roquette America, Inc.’s Verified Petition to Reopen Finance Docket No. 32549, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 32549 (Sub-No. 22), any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 32549 (Sub-No. 22) and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated:_____

Exhibit 2

UNDERTAKING — HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on February 25, 2000, governing the production and use of Confidential Information and Confidential Documents in the proceeding on Roquette America, Inc.’s Verified Petition to Reopen Finance Docket No. 32549, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 32549 (Sub-No. 22), any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 32549 (Sub-No. 22) and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

APPENDIX B

**STB Finance Docket No. 32549 (Sub-No. 22)
Service List**

Richard E. Weicher
The Burlington Northern and
Santa Fe Railway Company
547 West Jackson Boulevard, Suite 1509
Chicago, IL 60661

Sidney L. Strickland, Jr.
The Burlington Northern and
Santa Fe Railway Company
Government Affairs
1001 G Street, N.W., Suite 1210W
Washington, D.C. 20001-4545

Michael E. Roper
The Burlington Northern and
Santa Fe Railway Company
P. O. Box 961039
2500 Lou Menk Drive, 3rd Floor
Ft. Worth, TX 76131-0039

Adrian L. Steel, Jr.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101

Robert Opal
Law Department
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, NE 68179

J. Michael Hemmer
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Karl Morrell
Ball Janik, LLP
Metropolitan Square Bldg.
1455 F Street, N.W., Suite 225
Washington, D.C. 20005

William A. Mullins
Troutman Sanders
1300 Eye Street, N.W., Suite 500E
Washington, D.C. 20005

Dan LaKemper
Pioneer Rail Corp.
1318 S. Johanson Road
Peoria, IL 61607

Roger W. Fones, Chief
Joan S. Huggler
Transportation, Energy and Agriculture Section
Antitrust Division
U.S. Department of Justice
Liberty Place
325 7th Street, N.W., Suite 500
Washington, D.C. 20530

Jane H. Bachner
Deputy Associate Administrator for Policy
Joseph R. Pomponio
Office of the Chief Counsel
Federal Railroad Administration
1120 Vermont Avenue, N.W., 7th Floor
Washington, D.C. 20005

Paul Samuel Smith
Office of the General Counsel
Office of the Secretary
U.S. Department of Transportation
400 7th Street, SW, C-30
Washington, D.C. 20590

Nicholas DiMichael
Frederic L. Wood
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3934
Counsel to NIT League

Honorable Charles E. Grassley

United States Senate, SH – 135
Washington, D.C. 20515-1501
Attn: Mr. John Conrad

Honorable Tom Harkin
United States Senate, SH – 731
Washington, D.C. 20515-1502
Attn: Mr. Richard Bender

Honorable Leonard Boswell
U.S. House of Representatives, 1029 LHOB
Washington, D.C. 20515-1503
Attn: Mr. Ned Michalek

Honorable John Ashcroft
United States Senate, SH – 316
Washington, D.C. 20510-2502
Attn: Ms. Lori Sharpe

Honorable Kenny Hulshof
U.S. House of Representatives, 412 CHOB
Washington, D.C. 20515-2509
Attn: Mr. Scott Callicott

Honorable Tom Vilsack
Governor
State Capitol
Des Moines, IA 50139-0001
Attn: Mr. John Norris

The Honorable Mel Carnahan
Governor
Missouri Capitol Building
Jefferson City, MO 65101
Attn: Mr. Mike Hartmann

Dan Franklin
Assistant Director
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Thomas F. Jackson
Director, Office of Planning Services
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Peggy Baer
Office of Program Management
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

James L. Gibson
Rail Regulation & Operations
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Mel Sundermeyer
Director, Multimodal Operations Division
Missouri Department of Transportation
105 West Capitol Avenue
Jefferson City, MO 65102

Jack Hynes
Administrator of Railroads & Waterways
Missouri Department of Transportation
105 West Capitol Avenue
Jefferson City, MO 65102